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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 681

THE SHIP CONSTRUCTION & TRADING CO., INC.,
Petitioner,

vs.

THE UNITED STATES.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

ASBURY HAYNE DEYAMPERT,
HERBERT M. BINGHAM,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

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THE SHIP CONSTRUCTION & TRADING CO., INC.,
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vs.

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner asks for a writ of certiorari to review the Court of Claims' April 1, 1940, judgment (trial May 3, 1939; motion for a new trial overruled October 7, 1940), reversing its Commissioner and (a) dismissing plaintiff's petition for $3,198,298 damages for breach of contract by the United States Shipping Board, hereinafter referred to as the "Board," to sell wooden ships and (b) awarding $624,479.89 of which $324,361.62 is interest from March 18, 1922, to defendant on its counterclaim for an overpayment of $299,918.27 by the United States Shipping Board Emergency Fleet Corporation (now the Merchant Fleet Corporation, 46 U. S. C. A. 810a), hereinafter referred to as the

"Fleet Corp.", under a contract between the Fleet Corp. and plaintiff for the building by plaintiff of two wooden ship hulls.

Short Statement of the Matter Involved.

Court of Claims' 12 *Findings Summarized.*

1. The Board advertised wooden ships for sale (R. 36). 2. Plaintiff bid $2,100 each for the fleet (142 to be operated and the remainder to be junked), including undisposed of material removed as the ships were laid up and supported the bid with a certified check endorsed: " * * * to be returned by Aug. 10, 1921, if said bid is not accepted" (R. 39-40). 3. As a result of negotiations, plaintiff amended its bid to conditionally exclude 71 ships and unconditionally such removed material as the Board could not replace identically or in kind. If the bid were accepted, a formal contract was to be executed but "in the meantime" both were to be "firmly bound". Seventeen (including 9 disposed of for in excess of the bid price) were excluded, leaving 268, of which currently 10 were sold for $5,000 each, 1 for $8,000 and 1 transferred to the Navy was sold in 1928 for $10,650 (R. 40-45). 4. The Board did not adopt or approve the resolution set out in its official minutes for Aug. 9, 1921, accepting plaintiff's bid. Commissioner Lissner, who had been designated therefor, refused to approve said minutes prepared by the Board's secretary. The Board did not take any action unconditionally accepting plaintiff's bid. Action on the bid was authorization for negotiations by the Chairman, a commissioner and Mr. Farley, as a committee (R. 45-49). 5. No appraisement within the meaning of the statute authorizing sale "after appraisement" was made prior to August 15, 1922 (R. 50). 6. Commissioner Plummer informed plaintiff that the Board adopted a resolution accepting plaintiff's bid. He was not present

during much of the discussion and was not correctly informed. A certified copy of the acceptance resolution (bearing the Board's official seal (R. 88)), was delivered to plaintiff. The Board did not authorize the delivery. With knowledge that plaintiff claimed there had been an acceptance, and after having submitted four drafts of proposed contract which plaintiff "refused to accept on the ground none contained all the terms * * * of the bid", the Board resolved to present plaintiff with the form of contract satisfactory to its counsel and give plaintiff until August 23rd to execute same, failing which "all agreements and negotiations * * * be terminated * * * and * * * action * * * taken be * * * rescinded * * *" (R. 50-53). 7. In consideration of maintaining the *status quo*, and upon the mutual understanding that subsequent negotiations would be without prejudice to then existing rights, the Board extended time for execution of the contract to "September 29th at noon." September 8th plaintiff agreed to pay $2,400 each for the ships. September 27th, having concluded there had been no sufficient appraisement, the Board resolved to decline to enter into a contract and delivered plaintiff a copy of the resolution. September 28th the plaintiff executed and delivered said contract to the Board (R. 53-58). 8. October 8th the Board offered to, and February 13th, 1922, did return the certified check, on plaintiff's consent without prejudice (R. 58). 9. In August, 1922, the Board had the ships appraised. The appraisement was $2,500 a vessel (R. 58; for scrap and minus removed equipment, R. 181, 41-42). 10. In September, 1922, the Board sold 226 and in 1923, 9 of the 268 ships for scrap, exclusive of the removed material, for $3,318.58 each and the dismantler lost $1,196.16 a ship, but nine other dismantlers of two ships each realized an average of $2,061.45 a ship (R. 58-59). 11. "There was no established market value for the vessels. * * * The fair and reasonable value of the

fleet of 268 * * * at the time of plaintiff's bid (July 30, 1921), and at all times thereafter to and including September 27, 1921, did not exceed the amount bid * * * $2,100 a vessel. The evidence * * * does not establish what profit, if any, plaintiff could have realized on the ships as a whole if they had been delivered * * * in accordance with its bid or * * * the contract first proposed but later withdrawn * * * before acceptance. The separate value of machinery, equipment, spare parts, and supplies on board the vessels or on shore * * * is not satisfactorily proved" (R. 59). 12. June 15, 1917, the Fleet Corp. gave plaintiff a contract to construct two ship hulls. July 11, 1917, the President delegated to the Fleet Corp. power Congress had given him regarding construction of vessels. Work by plaintiff having been previously stopped under the provisions of said contract, November 22, 1917, the same parties made a supplemental contract. Construction was completed thereunder at the expense of the Fleet Corp., which overpaid plaintiff by means of checks on deposits available to it under the Act of Sept. 7, 1916, and subsequent Acts of Congress. Feb. 28, 1922, the Fleet Corp. stated an account showing a balance of $488,310.24 and delivered it to plaintiff on or before March 18, 1922. The parties stipulate that if the defendant may assert the claim for the overpayment, there is due ("upon the trial", R. 262) $299,918.27 (59-68).

References to and discussions of the evidence material to the questions presented and errors assigned are set forth under the pertinent points in the brief submitted herewith.

Relevant Parts of Statutes Involved.

Act of Sept. 7, 1916, c. 451, sec. 3; 39 Stat. 729; 46 U. S. C. A. 804:

> "A board is hereby created to be known as the United States Shipping Board and hereinafter referred to as the board * * *"

* * * * * * *

"The duties of the board may be so divided that under its supervision the directorship of various activities may be assigned to one or more commissioners * * * The board shall have an official seal, which shall be judicially noticed."

Act of Sept. 7, 1916, c. 451, sec. 11; 39 Stat. 731; 46 U. S. C. A. 810:

"The board * * * may form under the laws of the District of Columbia one or more corporations for the * * * construction * * * of merchant vessels in the commerce of the United States. The total capital stock * * * shall not exceed $50,000,000. The board may * * * subscribe to, purchase, and vote not less than a majority of the capital stock * * *. The board, with the approval of the President, may sell any or all of the stock * * * but at no time shall it be a minority stockholder therein * * *"

Act of June 5, 1920, c. 250, sec. 4; 41 Stat. 990; 46 U. S. C. A. 863: Set forth in finding 12 (R. 67).

Merchant Marine Act of June 5, 1920, c. 251, sec. 5; 41 Stat. 990; 46 U. S. C. A. 864:

"* * * the board is authorized and directed to sell, as soon as practicable, consistent with good business methods and the objects and purposes to be attained by this chapter, at public or private competitive sale after appraisement and due advertisement * * * all the vessels * * * acquired by the board. Such sale shall be at such prices and on such terms and conditions as the board may prescribe."

Questions Presented and Errors Assigned.

The primary questions are:

1. Was there a contract between plaintiff and the Board for the purchase and sale of the ships?

2. Was there sufficient appraisement of the ships to satisfy the statute directing their sale "after appraisement"?

3. How much damage did plaintiff sustain as a result of the Board's breach of the contract to sell the ships?

4. Does the defendant own or may it assert the counterclaim for the overpayment to plaintiff by the Fleet Corp. in connection with the contract between the Fleet Corp. and plaintiff for the building of two ship hulls?

5. Should interest have been allowed on the unliquidated counterclaim?

The court below erred in finding damages were not proved and in making findings and conclusions based upon negative answers to questions 1 and 2 above and affirmative answers to questions 4 and 5 above. It also erred in making findings and conclusions based upon negative answers to underlying detailed questions 6, 7, 9, 10, 12, 13, 14, 16, 19, 20, 22 and 23 and affirmative answers to such questions 8, 11, 15, 17, 18 and 21, set forth below, because "only the questions specifically brought forward" will be considered:

6. On the basis of findings 4, 6 and 7 is the document executed and delivered to the Board Sept. 28, 1921, a binding contract? 7. Is there a lack of substantial evidence to sustain the material parts of findings 4 and 6 adverse to plaintiff? 8. Are said parts of said findings 4 and 6 sustained by the findings of evidentiary or primary facts? 9. Was plaintiff's bid as amended accepted by the Board? 10. Is the defendant estopped to deny the Board made a contract with plaintiff? 11. Is ultimate finding 5 sustained by the findings of evidentiary or primary facts? 12. Is there a finding as to what was done with reference to appraisement on the issue whether same was a sufficient compliance with the statute directing appraisement? 13. Is the statute

that directs appraisement directory and not mandatory, whereby the sale might have been made without other previous appraisement? 14. Is defendant estopped to deny there was sufficient appraisement of the ships? 15. Does finding 11 cover the pertinent period, whereby there is a finding on damages? 16. Is there a lack of substantial evidence to sustain the relevant and material parts of finding 11? 17. Is finding 11 sustained by the findings of evidentiary or primary facts? 18. Should the evidence of the loss of the dismantler set forth in finding 10 have been received or considered in arriving at values and damages? 19. Should plaintiff's exhibits 42, 43 and 47 for identification have been received and considered in determining values and damages? 20. Is there a lack of substantial evidence to sustain that part of finding 10 which states Western Marine & Salvage Co., lost $281,098.80? 21. Is said part of said finding 10 sustained by the findings of evidentiary or primary facts? 22. Is there a lack of substantial evidence to sustain the material parts of finding 12 adverse to plaintiff? 23. Is there a lack of substantial evidence to sustain that part of finding 12 which states that in making the supplemental contract of Nov. 22, 1917, the Fleet Corp. "was acting for the United States"?

Reasons Relied Upon for Allowance of Writ.

I. The Court of Claims in refusing to conclude, on the basis of its findings 4, 6, and 7, that the form of contract the Board offered to make, if plaintiff would execute and deliver it before "September 29 at Noon", became a binding contract upon the execution and delivery thereof by plaintiff to the Board September 28, 1921, failed to correctly apply this Court's decision in *Union Bank* v. *Geary*, 30 U. S. 99, 114 and the well settled law (*In re All Star Feature Corp.*, 232 Fed. 1004, 1009 (D. C. S. D. N. Y., 1916); *Dillon*

v. *Lineker,* 266 Fed. 688, 690 (C. C. A., 9th Cir., 1920); *Williston on Contracts; Williston & Thompson Edition,* § 136, p. 479, and cases cited in footnote 4 thereof) and reached a grossly unjust and incorrect result.

II. There is a lack of substantial evidence to sustain the material parts of findings 4, 5, 6, 10, 11, and 12 adverse to plaintiff. The evidence is to the contrary of said parts of said findings.

III. Finding 11, that the ships had no value in excess of $2,100, is ill-founded in law because hopelessly and quite obviously contradictory of the parts of findings 7, 3, and 10 that record the $2,400 offer and the numerous sales for greatly in excess of $2,100 within and very close to the period plaintiff would have been taking delivery, had the contract been consummated, and damages of plaintiff were conclusively shown, including the $10,000 spent in getting ready to perform after notice from the Board of acceptance (R. 85).

IV. The conclusion (R. 69) that the defendant owns or may recover upon the counterclaim is contrary to this Court's decisions in *Sloan* v. *U. S.,* 258 U. S. 549, 565, 566, 571; *Providence Engineering Corp.* v. *Downey Shipbuilding Corp.,* 294 Fed. 641 (C. C. A. 2nd), certiorari denied 264 U. S. 586; *U. S.* v. *Strang,* 254 U. S. 491, 493; *Skinner & Eddy Corp.* v. *McCarl,* 275 U. S. 1, 8, 11; *Merchant Fleet Corp.* v. *Harwood,* 281 U. S. 519, 526; *U. S.* v. *Wood,* 290 Fed. 109, affd. 263 U. S. 680; and the decision in *U. S. S. B. Emergency Fleet Corp.* v. *Tabas,* 22 F. (2d) 398 (C. C. A. 3rd).

V. Allowance of the interest before judgment on the unliquidated counterclaim (the finding of an account stated at $488,310.24 in 1922 is fatally inconsistent with stipulating in 1936 the amount at $299,918.27, for use "upon

the trial") is so contrary to universally recognized law in all courts, including the Court of Claims (*Truscon Steel Co.* v. *U. S.*, 70 Ct. Cls. 727, at 729-730; *Standard Steel Co.* v. *U. S.*, 67 Ct. Cls. 445, at 488-490), and unjust as alone to warrant review and reversal.

VI. Whether the Government owns the Fleet Corp.'s rights under a purely commercial contract is a question in which the public and Congress are vitally interested.

VII. The application is meritorious. Plaintiff has been most unjustly and unfairly treated in the judgment sought to be reviewed and reversed.

Authorities supporting the above reasons are: *U. S.* v. *Clark*, 96 U. S. 37, at 40, 44; *U. S.* v. *Berdan Firearms Co.*, 156 U. S. 552, at 573; *Cramp* v. *U. S.*, 239 U. S. 221, at 232; *Hathaway* v. *U. S.*, 249 U. S. 460, at 463; *Luckenbach S. S. Co.* v. *U. S.*, 272 U. S. 533, at 539; *Indiana Farmers Guide* v. *Prairie Pub. Co.*, 293 U. S. 268, at 281; 28 U. S. C. A. 288 (b).

Certiorari should be granted.

ASBURY HAYNE DEYAMPERT,
HERBERT M. BINGHAM,
Counsel for Petitioner.

January 4, 1941.

BRIEF.

The Opinion Below (R. 69-80) is unreported.
Jurisdiction is invoked under 28 U. S. C. A. 288 (b).

ARGUMENT.

I.

The Form Executed and Delivered by Plaintiff to the Board, September 28, 1921, is a Binding Contract.

Findings 4, 6 and 7 (pp. 2-3 *supra;* R. 45-58,) sustain the above point. The opinion below gave no consideration to it. Finding 11 refers to it as "the contract first proposed but later withdrawn by the board before acceptance".

Knowing that plaintiff claimed that the Board had accepted its $2,100 bid and that the bid provided for a formal contract after acceptance, although in the meantime both were to be firmly bound (p. 2, *supra,* F. 3), the Board, August 19, 1921, delivered to plaintiff the form of contract satisfactory to its general counsel, instead of accepting the $2,400 offer of third parties then before it (*infra,* p. 15). In consideration of maintaining the *status quo,* "without prejudice to the rights of either side" the Board gave plaintiff until "September 29th at noon" to execute and deliver that contract. Plaintiff did so September 28th. The offer could not be withdrawn before the 29th, because there was consideration for the option keeping it open. It was plaintiff's waiving its right to sue immediately for breach of the contract, resulting from the Board's denial of the acceptance and refusal to proceed. Long ago this Court so declared the law to be.

Union Bank v. *Geary,* 30 U. S. 99, affirmed a decree perpetually enjoining enforcement of a judgment by confession against the administratrix of the indorser of a note. Confession of judgment had been induced by a promise that

it would not be enforced and that collection would be made from the maker. Consideration was giving up a doubtful defense, afterward adjudged insufficient. The opinion states (p. 114):

> "It is unnecessary to examine whether this defence would have been available or not. The validity of the contract did not depend upon that question. It is enough that the bank considered it a doubtful question; and that they supposed they were gaining some benefit by foreclosing all inquiry on the subject; and the complainant, by precluding herself from setting up the defence, waived what she supposed might have been of material benefit to her * * * And to permit a subsequent judicial decision on this point in their favor, as having a retrospective effect, so as to annul a settlement or agreement made by them under a different state of things would be sanctioning a most mischievous principle."

The giving up by the plaintiff of said right to sue immediately was adequate consideration, even if it should be ultimately decided that there was no acceptance of the bid originally or by ratification. Doubt was so great, that the Board asked for and received maintenance of the *status quo*.

The revised edition of *Williston on Contracts* by Williston & Thompson (sec. 136, p. 479) stated the rule as follows:

> "* * * But forebearance for a reasonable time if requested is sufficient consideration, even though no promise of forebearance is made, a unilateral contract being as good as a bilateral."

There is a wealth of authorities, including those mentioned in Reason I (p. 7, *supra*), cited in note 4 to said section 136, supporting plaintiff's contention that the contract executed and delivered by plaintiff to the Board September 28th, 1921, is a binding contract.

II.

The Board Accepted Plaintiff's Bid; Ratified and Approved the Delivery of Its Resolution to Plaintiff and the Acceptance Thereby Conveyed; and is Estopped to Deny Same.

In 1922 the seven commissioners constituting the Board; its secretary, Mr. C. W. Smith; its shorthand reporter, Mr. Amand, whose untranscribed notes of the Board's meetings of August 18 and 19, 1921, were read at the trial; and plaintiff's vice-president, Mr. Orth, testified in a mandamus proceeding in the Supreme Court of the District of Columbia in 1922. Their testimony is evidence herein by stipulation.

The opinion of Mandamus Trial Judge Stafford, so far as material, states:

> "Now, the relief asked either would or would not give the petitioner some claim to the property which it does not now possess, * * * If it would not give it any such claim in addition to what it has already by virtue of the offer and acceptance, it would be an entirely useless thing to grant the relief."

Commissioner Hobb's report to the Court of Claims also stated plaintiff's bid was accepted by the Board.

Chairman Lasker, as allowed by statute (*supra*, pp. 4-5), had appointed Commissioner Plummer and Mr. Farley, assistant to the chairman, a committee to direct the sales of the wooden ships (Lasker: R. 110, 116; Farley: R. 161, X Q. 120; Plummer: R. 91, 101; O'Connor: R. 124; Chamberlain; R. 95-96; Orth: R. 81-82; Amand's minutes, August 9, 1921, meeting: R. 104-105; Smith's minutes, August 9, 1921, meeting: R. 107).

As a result of negotiations by plaintiff with said committee, a decision was reached as to what plaintiff "should get and how it should be arrived at" (Orth: R. 87) and "all of the different points discussed and agreed upon" were in-

corporated in plaintiff's amended bid (Orth: R. 82; Plummer, in the August 9, 1921, meeting of the Board; R. 104) submitted as set forth in finding 3.

Commissioner Plummer testified that August 9, 1921, he introduced the resolution accepting plaintiff's bid; that he understood it was passed, and that the delivery to plaintiff of a certified copy of said resolution was made by him or upon his direction (R. 77, 101-102). He said that the resolution was the one "Mr. Farley and I gave to the Board with our signatures. You will find in the minutes that I read it" (R. 95).

Mr. Smith said he was present during the meeting; heard the resolution introduced; believed it was passed; prepared the minutes (set out in finding 4), showing it and other resolutions, covering sales of other ships of the fleet of wooden ships which were consummated (Chamberlain: R. 122-123; Lasker: R. 118), were passed; and certified the copy delivered to plaintiff (set out in finding 6), on which the Board's seal (required to be judicially noticed, *supra*, p. 5), was placed (R. 88).

Commissioner (Senator) Chamberlain said at the Board's August 19, 1921, meeting, "We cannot cancel unless there is some real reason for it" and "We ought to carry out our contract in good faith" (R. 92, 94). He testified: "The resolution, as I recall, was passed by the board * * * as a tentative proposition * * * the resolution was read by Mr. Plummer, and after discussion it was passed as part of the general discussion in connection with the disposition of wooden ships * * *" (R. 122, 75).

Commissioner (Admiral) Benson testified that he was not present at the August 9, 1921, meeting, but a few days later heard three or four of the commissioners say that the Board August 9, 1921, regularly passed the resolution accepting plaintiff's bid (R. 102).

Commissioner O'Connor testified that the Board August 9, 1921, authorized Messrs. Plummer and Farley to trade with plaintiff (R. 124).

Commissioners Thompson, Lissner and Lasker were confronted with portions of the reporter's transcribed notes of the Board's meeting of August 9, 1921, and cross-examined by Judge Stafford (R. 104-105, 106; 107-108; 108-109; 114-115).

Chairman Lasker testified that the "Vote was taken not merely on the resolution but on the scheme of things to be done * * * for me to take it up with the President, and then the resolution, on my declaration that the details were right and that the President approved could have become binding" (R. 117) and that the committee, Messrs. Farley and Plummer, were authorized to make the trade, "That without further meetings we could go ahead," if the details were cleared up and he informed them that the President assented (R. 115). At the Board's meeting of August 18, 1921, he had said "The board accepted this bid subject to his meeting our terms, we can make them what we want" (R. 91) and in its meeting of August 19, 1921, that he did not wish to take the matter up with the President and had not done so (R. 98). He said that the reporter's minutes were "right in effect" (R. 115).

Commissioner Lissner, appointed by Chairman Lasker to approve minutes, because he was "exacting on details" (R. 117) *did not doubt the correctness* of the reporter's transcribed notes of the Board's August 9, 1921, meeting (R. 108). He testified: "* * * the suggestion was made and generally approved that we should take a tentative vote on the high bid * * * in this case" (R. 108, 73). At the Board's August 9, 1921, meeting, when the Chairman asked "Do you want to authorize them to go ahead on that basis?" he said, "What else can we do?" (R. 106, 114-115).

Adoption of resolutions accepting offers of third parties,

set out in the minutes in finding 4 along with the resolution accepting plaintiff's bid, is conceded (Chamberlain: R. 123; Lasker: R. 118).

Commissioner Thompson testified that he voted on the question as stated "with interpretations" (R. 107). August 19, 1921, referring to the Board's August 9, 1921, resolution he said "cannot the Board rescind the former resolution?" (R. 91).

Plaintiff tried unsuccessfully to have the Board produce the reporter's transcribed notes of its August 9, 1921, meeting (R. 222-223). Extracts therefrom, used in cross-examining some of the commissioners and discussed at the August 19, 1921, meeting of the Board are in the record at pages 104-105, 106, 114-115 and 97.

The untranscribed minutes of the August 18 and 19, 1921, meetings as read at the mandamus trial appear at pages 90-91, 91-100 ~~and 116-125,~~ respectively. Commissioner Chamberlain expressed the thought that the minutes of the discussion at the August 19, 1921, meeting "might well be omitted" and the Chairman thereupon directed the reporter: "Don't write up the minutes of this" (R. 100).

August 19, 1921, the Board considered an all-cash offer, from California people, of $2,400 each for the ships, without the removed material (R. 91, 86, 228). The Commissioners and the Board's counsel pointed out and conceded among themselves that plaintiff's bid had been already accepted (Lasker: R. 90-91; Thompson: R. 91; Chamberlain: R. 92, 94; Benson: R. 93, 98; Plummer: R. 95; Lissner: R. 97; O'Connor: R. 100; Farley: R. 96, 98; Schlessinger: R. 95, 96, 98; Freund: R. 94).

Commissioner Plummer stated he had given plaintiff the certified copy of the acceptance resolution so that a performance bond could be obtained (R. 94). The conclusion was that a contract drawn up by Mr. Freund from a letter (the amended bid), and required by it (R. 43-44), would be

given to plaintiff with a demand that plaintiff execute it by noon Monday, or the Board would refuse to make the contract (R. 99-100), and under Mr. Farley's belief that plaintiff could not execute the contract within that time (R. 94). The Board adopted and delivered such a resolution as set out in finding 6. Finding 7 sets forth what happened thereafter.

Recognition that it was ~~an intention to be~~ bound is the only reason worthy of consideration that can be adopted for the Board's sending plaintiff a contract instead of accepting the much more favorable offer.

Retention of plaintiff's check, at a cost of $300 a month to plaintiff (R. 85); the statute requiring judicial notice be given the seal on the copy of the acceptance resolution delivered to plaintiff (p. 5, *supra*); the $10,000 spent by plaintiff in reliance on the communicated acceptance (R. 85); the statute permitting delegation of duties to individual members (p. 5, *supra*) and the delegation to Commissioner Plummer (with Mr. Farley) the sale of the ships (p. 12, *supra*); and *Levinson* v. *U. S.*, 258 U. S. 198, 201; *Commissioner* v. *Aspinwall*, 62 U. S. 539; *Cooke* v. *U. S.*, 91 U. S. 389, 398; *et al.* sustain the estoppel.

In its commercial transactions, the Government has no sovereign privileges (*Bank of U. S.* v. *Planters Bank*, 22 U. S. 904, 907-908; *Chesapeake & Delaware Canal Co.* v. *U. S.*, 250 U. S. 123, 126; *Salas* v. *U. S.*, 234 Fed. 842 (C. C. A. 2nd Cir.).

Furthermore, as Commissioner Admiral Benson testified, it was usual for the Board's secretary to deliver acceptance resolutions to successful bidders without special authorization (R. 102). The Government "must always have some representative authorized to act for it in all the emergencies of its commercial transactions" (*Cooke* v. *U. S.*, *supra*).

The part of finding 6 (pp. 2-3, *supra*) that the Board did not authorize delivery of a copy of its August 9, 1921, reso-

lution is not supported by a scintilla of evidence. The evidence is exactly to the contrary.

The bid and ratification of the acceptance was a contract (*American Smelting Co.* v. *U. S.*, 259 U. S. 75; *Garfield* v. *U. S.*, 93 U. S. 242). The Court of Claims should have reached the result it did in *Briggs & Turivas* v. *U. S.*, 83 Ct. Cls. 664.

III.

Appraisement of the Ships Was Made; Defendant is Estopped to Deny Same; and the Statute Specifying Appraisement Being Directory and Not Mandatory, Sale Might Have Been Made Without Other Previous Appraisement.

In June of 1921, the Board employed Mr. Farley for 2 years at a salary of $20,000 (R. 120). He was an experienced ship broker and dealer (R. 134, 152). He gathered all the information on the wooden ships (R. 120). Mr. Philbin was then and continued to be the Board's Manager of Ship Sales Department (R. 124, 158). Mr. Farley caused additional employees to be put into said Ship Sales Department; Mr. Swan, a naval architect, and others, for the purpose of supplying him data on which he could determine the value of the ships (R. 161, 163, 164, 169, 170-171). He testified that with respect to placing a value on the ships as an authorized representative of the Board: "I made up my mind and then discussed it with Mr. Plummer * * * and with the commissioners" (R. 171, X Q. 285) and that before the bids were opened: "I had made recommendations to Mr. Plummer as to what I thought were the values" (R. 171, X Q. 312).

Chairman Lasker said the ships had been appraised (R. 87-88, 120). Mr. Philbin, in fulfillment of a duty in an executive capacity, submitted to the Board his written estimate of the value of the wooden ships, dated July 12, 1921 (R. 125-

127). The valuation is from $2.00 to $7.50 per ton (R. 226), depending upon the need for repairs, as indicated on plaintiff's exhibit 26 (R. 230-235). The Board circulated advertisements of the ships for sale, approved by its legal counsel (Farley: R. 161, X Q. 124; Philbin: R. 129, Q. 70) which stated: "The Board has established a minimum price on these vessels" (R. 162). Plaintiff received and produced a copy of said advertisement (R. 161).

The Board valued the ships for insurance, as self insurer, at $60 per ton as late as August 1921 (*infra*, p. 20).

The statute does not require sale at not less than the appraisement, but "at such prices * * * as the board may prescribe" (*supra*, p. 5). Appraisement might, therefore, have been deemed to be made at the price accepted (*Omaha* v. *Omaha Water Co.*, 218 U. S. 180, 187, 193; *Johnston* v. *National Sand & Gravel Co.*, 172 La. 388; *Fallon* v. *Hattemer*, 229 App. Div. (N. Y.) 397, 401).

Selling 22 of the ships in August and September, 1921 (R. 122-123, 118, 144), and one January 12, 1922, for $10,000 (*infra*, p. 20) after claiming, about September 27, 1921, non-appraisement as a reason for not consummating the sale to plaintiff (R. 50-52; Lasker (R. 121), shows the lack of good faith of the Board in contending insufficient appraisement. The Board's resolutions (pp. 14-15, *supra*) state it "has done all the things required of it to be done" under the statute directing appraisement (p. 5, *supra*).

The Board's representations, in the advertisements and in its resolutions, that the ships had been appraised estop defendant from denying there was sufficient appraisement. (Authorities in point II.) As was said in *U. S.* v. *Stage Co.*, 199 U. S. 414, at page 424:

> "* * * it is a fact peculiarly within the knowledge of the Government agents and upon which in the advertisement, it spoke with certainty."

Hollerbach v. *U. S.*, 233 U. S. 165, 171-2; *Spearin* v. *U. S.*, 248 U. S. 132, 138; *U. S.* v. *Atlantic Dredging Co.*, 253 U. S. 1 are also applicable.

H. Rep. Report No. 2, 1st session, 69th Congress, of the Committee investigating the Board, states at page 53:

> "Basic prices have been determined for the vessels by a fleet survey report" (Plaintiff's exhibit 26). "These prices so fixed were adopted as the appraisal price of the boats offered * * *. This general policy and plan has been followed since some time in the year 1921."

The August 15, 1922, appraisement for scrap, set out in finding 9, has no bearing on any issue.

IV.

Damages Were Proved.

Mr. Barnett had been in the ship business 30 years; pioneered in building the wooden ships; valued ships almost every day for 15 years; had done so for the Department of Justice and for the Board; knew of all sales of the wooden ships; acted as a broker and operator of and knew the market for wooden ships (R. 139-144, 149, Q. 362). He testified that the wooden ships involved, for operation and equipped accordingly, had a market value of $13,000 each for up to 100, at pertinent times herein, and those for scrap, as they stood, had a market value of $10,500 each (R. 145, Q. 224-225; 147-148, 151).

Mr. Farley, defendant's chief witness, who thought the Board should sell the ships only to be dismantled, because their sale "commercially would have been damaging to the assets of the country in the form of its steel ships" (R. 152, 164), admitted on cross-examination that there was a market for them for operation (R. 165). Mr. Philbin also testified there was a market for them for operation (R. 136, X Q. 261).

Data furnished by the Board to a Congressional Committee [1] and printed by order of Congress, showing the sales recorded in findings 3 and 10 and of one of the ships January 12, 1922, for $10,000; sales of several similar wooden ships for up to $315,000 and of 23 of the 268 involved for $47,000 each in 1919-20, that the Board received $24,000 for each of those 23 before repossessing them, and that the original cost of said 23 was from $643,000 to $791,000 each; and that the Board's valuation for insurance, as late as August 1921, was $60 per ton, were marked for identification plaintiff's exhibits 39, 40-A, and 38, but not received in evidence because the Commissioner considered them to be available as Public Documents (R. 176-177).

H. Rep. Report No. 2 *supra* at page 10 states that as of January 1, 1920, 317 of the wooden ships "were in commercial operation"; at page 30: "* * * during the last four and a half years the Shipping Board has disposed of an average of more than one ship every two days, not counting the 237 wooden ships which were sold for scrapping and the 199 steel ships which were recently sold to Ford for scrapping. The Shipping Board has sold 1,380 ships in the aggregate. * * * We are opposed to a policy of scrapping the ships."; at page 30: "For these vessels sold since June 1921, the Board had received $68,000,000." and at page 34: "In other words, in an effort to promote a ship-scrapping program much misrepresentative and misleading statements in regard to the quality and condition of our ships have been industriously circulated * * * the real motive is to eliminate the possibility of these ships

[1] Printed at pages 2140-2143, 2110-2120, and 4372 of "Exhibits to Hearings before Select Committee of Inquiry into Policies and Affairs of the United States Shipping Board and Emergency Fleet Corporation, House of Representatives, Sixty-eighth Congress" and admissible from said official printing as Public Documents (*U. S.* v. *McCoy*, 193 U. S. 593, at 601; Wigmore on Evidence, 3rd ed. secs. 1684, 1677; *N. Y. Indians* v. *U. S.*, 170 U. S. 1 at 32).

passing into the hands of other American citizens and perhaps being operated in competition; and to destroy as many existing ships as possible in order that there may be more ship construction in the future. * * *"

Defendant's witnesses Farley, Henry, Cox and Von Herbulis testified the ships had no commercial value for operation and all except Henry that their value for scrap was $2,000 each (R. 155-156, 163, 167, 173, 178-179, 180, 186-187, 188). Their opinions and the opinion below were based upon immaterial belief no profits could be made from operating the ships (R. 155-156, 175, 182-183, 189 X Q. 170; 98). Furthermore the recorded sales and fact 317 were in commercial operation make their testimony worthless and no support for finding 11. A threshing machine can't be operated out of season yet it has value (*Redhead Bros.* v. *Wyoming Cattle Co.*, 126 Ia. 410, 102 N. W. 144).

The income tax paid by Western Marine & Salvage Co. (R. 249); its initial realization of from $15,000 to $25,000 for the 496 tons of machinery and metals salvaged from each of the ships (R. 247; 243 tons at $51.73 per ton and 253 tons at $10.76 per ton, or 496 tons at $51.73 per ton); its sale of 36 hulls for $86,500 (R. 253); and failure to try to sell others (R. 208); its receipt of $4,000 to $4,500 insurance for one wrecked hull (R. 205, X Q. 161) and $33,000 for 7 hulls destroyed by fire in Orange, Texas (R. 252); its offering the ships for salvage in 1923 at $12,000 each (R. 243-244), in 1924 at $10,000 each (R. 241) and refusal to consider an offer of $5,000 each (R. 242); its Feb. 28, 1923, valuation of 15 of the ships in Texas at $15,000 each and 205 of them in Virginia at $12,500 each (R. 247), without doubt based on the profit on those theretofore dismantled; and finally its actual receipt of $2,650,313.21 for the 235 for scrap or to be scrapped (R. 254B), minus removed material (R. 59), mathematically more than justify Mr. Bar-

nett's testimony as to the market values of the ships, where the cost of dismantling and selling the salvaged material from each of two of the ships was only $1,818.48 (R. 214) and obviously the fleet could have been handled at a less cost per ship. Proof of damages to mathematical certainty, or indisputable accuracy, however, is not required (*Eastman Kodak Co.* v. *Sou. Photo. Mat. Co.*, 273 U. S. 359, 378; *Hetzel* v. *U. S.*, 169 U. S. 26, 39; *U. S.* v. *Burton Coal Co.*, 273 U. S. 337).

A "verdict" based on a less valuation than the minimum price of the numerous current sales at from $5,000 to $25,000 for operation (R. 147-148; *supra* p. 2) and $3,318.58 for scrap is a miscarriage of justice (*U. S.* v. *Swift & Co.*, 270 U. S. 124, 149; Williston on Contracts, rev. ed. Williston and Thompson, Sec. 1379, p. 3851).

The inconsistency and fatal error in finding that the ships had no value in excess of the bid price of $2,100 (*supra* pp. 3-4 F. 11) and that plaintiff, without prejudice to rights under its bid, offered $2,400 (*supra* p. 3 F. 7) and stating in Judge Littleton's opinion that they had a value of $2,122.42 each (R. 78), based upon inadmissible evidence of loss of a dismantler (*Robinson* v. *Samuels*, 196 S. W. 893, 900; *Reiser* v. *Lawrence*, 96 W. Va. 82), in the face of it having been called to the court's attention that the August 19, 1921 third party bidder of $2,400 each got the ships later for $3,318.58, warrants review and reversal.

Market value measures damages (*Sedgwick on Damages*, 9th ed. sec. 734); is the price in the ordinary course of trade (*Cliquot's Champagne*, 70 U. S. 114, 141-2; *Muser* v. *Magone*, 155 U. S. 240); is *opinion* based on sales, letters from dealers, etc., (*Chaffee* v. *U. S.* 88 U. S. 516, 542; *Wigmore on Evidence*, 3rd ed. Sec. 1943; *Alfonso* v. *U. S.*, 2 Storey 421; *Spring & Co.* v. *Edgar*, 99 U. S. 645, 657; *Miss. & Rum River Boom Co.* v. *Patterson*, 98 U. S. 403; *Sedgwick on Damages*

9th ed. Secs. 244-246); and is ascertained upon a proper consideration of all relevant facts (*Standard Oil Co.* v. *Sou. Pac. Ry. Co.* 268 U. S. 146, 156).

Payment of $183,000 interest, high salaries to stockholder officers for 7 years after the last ship was dismantled February 21, 1925 (R. 249) to dissolution December 27, 1932 (R. 254A) and other tremendous unnecessary expenses incurred because of inefficiency (R. 247-254C), accounted for the income tax refunded and profit of more than $10,500 a ship (R. 248, 254B), whereby audits of Western Marine & Salvage Co. showed a loss. Evidence of the loss (R. 199-200, 201, 193), as already shown was improperly received over objections and exceptions diligently urged.

Defendant should be bound by its own evidence that the material removed from the ships, and which plaintiff was to have received, had a value of $900,000. (R. 126, 133-134).

Damages were proved, including the $10,000 in getting ready to perform, after notice of acceptance of the bid and the $300. a month keeping good the certified check supporting the bid (R. 85).

V.

Defendant Does Not Own the Counterclaim.

The June 15, 1917 construction contract was necessarily made by the Fleet Corp. under its charter powers for profit (set out in *Haines* v. *Lone Star Shipbuilding Co.*, 268 Pa. 92, 110 Atl. 788) because its delegated sovereign powers were only received July 11, 1917 by Executive Order 2664 (R. 62). Obviously Executive Order 3018 of Dec. 3, 1918 ratifying its previous acts, related to those purporting to have been done under the power ultimately delegated. It could not substitute the Fleet Corp. exercising delegated sovereign powers in the contract with plaintiff for the Fleet Corp. therein exercising its commercial for profit charter

powers. The Fleet Corp. exercising delegated sovereign powers and the defendant are strangers to both the original and the supplemental contract (R. 62, 63-66). The authorities in Reason IV (p. 8 *supra*) recognized and gave effect to the distinction between acts of the Fleet Corp. in its above mentioned capacities. They conclusively show defendant does not own the counterclaim.

Receipts for the hulls (R. 66) was evidence that the vessels are in the possession of the Fleet Corporation (R. 215-216).

Neither the contract, its supplement nor rights thereunder were "acquired by the President through any agencies", but by and remained the property of, the Fleet Corp. under its commercial for profit charter powers. Therefore, said rights could not have been transferred to the Board by said section 4, as concluded below (R. 79, 68). Furthermore, corporate action would have been necessary to effect a transfer, as a sole stockholder cannot convey property of a corporation (*Humphreys* v. *McKissick*, 140 U. S. 304; *Fed. Sugar Ref. Co.* v. *U. S. Sugar Equaliz. Board*, 268 Fed. 575, D. C. S. D. N. Y.)

VI.

Allowance of Interest on the Unliquidated Counterclaim, Alone Justifies Review, for Substantial Justice.

Taking considerable testimony thereon and finally stipulating June 12, 1936 (R. 262-263), for use "upon the trial" that the amount of the counterclaim should be $299,918.27 is fatally inconsistent with any notion that there was an "account stated" in 1922, showing a balance of $488,310. Physical inspection should show that the words "upon the trial thereof" were added to the stipulation as an afterthought, to make sure that no interest before judgment would be claimed or allowed. Such was the intention of the parties. The stipulation provides that if recovery may be

had, there is "now", "upon the trial" (judgment) due $299,918.27.

The replication (R. 32-34) and the Fleet Corp.'s letter to plaintiff, after the statement has been sent, conceding that "the legal status" of plaintiff's claims for additional payments under the construction contract were "being considered by the Claims Commission", show plaintiff never before the stipulation agreed upon or admitted any amount to be due the Fleet Corp. There was never, therefore, any "account stated", binding in a legal sense. The finding (R. 68) does not state that plaintiff accepted as correct the statement rendered. The evidence is to the contrary.

Authorities below (R. 79-80) have no application. Those in Reason V do (pp. 8-9 *supra*). Allowance of the $324,561 interest before judgment on the unliquidated counterclaim is gross injustice.

Conclusion.

The petition for the writ of certiorari should be granted.

Respectfully submitted,

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(1858)